Kaiser Aluminum & Chemical Corporation *and* United Steelworkers of America, AFL–CIO. Case 32–CA–17041

July 25, 2003

NOTICE OF PUBLICATION

On September 7, 2001, the Board issued an unpublished Order in the above-entitled proceeding. Pursuant to the request of the Charging Party, the Board has decided to publish the previously issued Order in the bound volumes of its decisions. The Order is attached.

ORDER

September 7, 2001

BY CHAIRMAN PETER J. HURTGEN AND MEMBERS LIEBMAN AND WALSH

We grant the Charging Party's Request for Special Permission to Appeal the administrative law judge's June 29, 2001 ruling denying the Charging Party's petition to revoke the subpoena duces tecum served on it by the Respondent. The Respondent's subpoena demands production of the position statements submitted by the Charging Party to the Region and to the General Counsel's Office of Appeals.

On appeal, we reverse the judge's ruling. Contrary to the judge, we find that the work product doctrine as reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure applies to unfair labor practice proceedings, and specifically to a position statement submitted by counsel for a charging party to the General Counsel in support of its charge during the General Counsel's investigation. We further find that a charging party does not waive the work product privilege by submitting such a position statement to the General Counsel.

Here, it appears undisputed that the Charging Party's position statements constitute "work product" within the meaning of FRCP 26(b)(3). Further, we find that the Charging Party did not waive the privilege by submitting the position statements to the General Counsel during the investigation. Finally, we find that the Respondent has not demonstrated a substantial need for the position statements.[1] Accordingly, we shall quash the subpoena to the extent it seeks the Charging Party's position statements.[2]

The subpoena also seeks any and all attachments to the position statements. To the extent the Charging Party may claim that any of these attachments constitute work product, we authorize the judge to review those documents in camera to determine whether they are also exempt from disclosure based on the work product privilege.

MEMBER WALSH, concurring.

I join my colleagues in reversing the judge's ruling. I find that the confidentiality interests and policy considerations set forth in *NLRB v. Robbins Tire Co.*, 437 U.S. 214 (1978), and *H. B. Zachry Co.*, 310 NLRB 1037 (1993), apply to the Charging Party's position statements provided to the Agency, as well as to witness statements that similarly cannot be obtained by subpoena from the Agency. My rationale applies with equal force to any documents that are attached to, and thus necessarily a part of, the position statements. Accordingly, I conclude that the Respondent cannot compel disclosure by the Union of the position statements that are the subject of the subpoena in question here.[3]

[1] FRCP 26(b)(3) provides that documents prepared in anticipation of litigation or trial shall be discoverable only upon a showing that the party seeking them has a "substantial need" for them and cannot obtain them elsewhere without undue hardship. The Rule further provides that, when the required showing is made, the court in ordering discovery shall "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation."

[2] In light of this finding, we find it unnecessary to address the Charging Party's argument that the position statements are also exempt from disclosure under the principles set forth in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), and *H. B. Zachry*, 310 NLRB 1037 (1993).